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CHARLES ELMORE DROPLEY
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Supreme Court of the United States

OCTOBER 1946 TERM.

**FRIEDMAN'S EXPRESS, INC. and the GIRARD
FIRE AND MARINE INSURANCE COMPANY,**
Petitioners,

AGAINST

**MILDRED LOEB, individually, and as Trustee for
CAROL LOEB and WILLIAM LOEB and
HARRY RUBENSTEIN, co-partners doing busi-
ness under the firm name and style of STARLET
UNDERWEAR CO.,**
Respondents.

**Petition for a Writ of Certiorari to the City Court of
the City of New York, County of New York,
and Brief in Support Thereof.**

**EMMET L. HOLBROOK,
JOSEPH HASKELL,**
Attorneys for Petitioners.

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IN THE
Supreme Court of the United States

OCTOBER 1946 TERM.

FRIEDMAN'S EXPRESS, INC. and the GIRARD FIRE AND
MARINE INSURANCE COMPANY,
Petitioners,
AGAINST

MILDRED LOEB, individually, and as Trustee for CAROL
LOEB and WILLIAM LOEB and HARRY RUBENSTEIN, co-
partners doing business under the firm name and
style of STARLET UNDERWEAR Co.,
Respondents.

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

The petitioners pray that a Writ of Certiorari issue to review the final order and judgment of the Court of Appeals, the Court of last resort in the State of New York, having jurisdiction thereof, which order was entered on May 15, 1947.

Statement and Summary of the Matters Involved.

The petitioner, Friedman's Express, Inc. is a Pennsylvania Corporation and is a common carrier of goods for hire by motor vehicle in interstate commerce subject to the Interstate Commerce Act, as amended (49 Stat. L. 543; 54 Stat. L. 920 [49 USCA Sec. 302]).

The petitioner, Girard Fire and Marine Insurance Company, is a Pennsylvania insurance corporation issuing,

among other things, motor cargo insurance on interstate shipments by motor carriers of property in accordance with the regulations of the Interstate Commerce Commission.

The petitioners were the defendants below.

The respondents, the plaintiffs below, are co-partners, and manufacturers of wearing apparel, including pajamas, located in New York City.

The respondents sued petitioner, Friedman, in the City Court of the City of New York, New York County, for the loss in transit of a part of an interstate shipment; and petitioner Insurance Company on its direct liability therefor under its policy of insurance. The liability was conceded but the respondents asserted a partial defense of limitation of liability under the contract of carriage. The City Court, after trial, sustained the partial defense and gave judgment for the limited amount of \$286 (Opinion, R. 82-88).

The Appellate Term of the Supreme Court of the State of New York, First Department, on respondent's appeal, by a divided court, modified the judgment by increasing the amount to the full value of the goods lost and affirmed as modified (Opinion, R. 102-109). The dissenting Justice voted to affirm on the authority of *Amer. Ry. Ex. Co. v. Lindenburg*, 260 U. S. 584 (Opinion, R. 109).

The Appellate Term thereafter granted leave to petitioners to appeal from its order and determination to the Appellate Division of the Supreme Court, First Department. The Appellate Division, also by a divided court, affirmed the order and determination of the Appellate Term, without opinion, the Presiding Justice dissenting. Thereafter the Appellate Division also gave leave to the petitioners to appeal to the Court of Appeals of the State of New York. That Court unanimously affirmed, without opinion. The order and judgment of the Court of Appeals is a final disposition of the controversy.

The matter involved is the extent of liability of a common carrier by motor vehicle for partial loss of a shipment in interstate commerce.

Jurisdiction.

The jurisdiction of this court is based on Section 237 of the Judicial Code (28 USCA Sec. 344) and, since the question presented involves the interpretation and application of the Interstate Commerce Act, on Article 3, Section 2 of the Constitution.

Facts.

On April 6th, 1944 at Sunbury, Pennsylvania, the Sunbury Manufacturing Co., on behalf of respondents, delivered to petitioner, Friedman's Express, Inc., for transportation and delivery to respondents in New York City, 10 cartons containing 71-6/12th dozen rayon pajamas with an aggregate weight of 572 pounds (R. 27; Plffs' Ex. 4, R. 73). The carrier's charges were to be paid by respondents, the consignees. 55 dozen pajamas, of a value of \$1,980 were lost in transit; 16½ dozen were delivered to respondents with petitioner Friedman's freight bill for \$5.03 freight charges calculated on its base rate of eighty-eight cents per 100 pounds (R. 54-56, 57-58, 60-61; Plffs' Ex. 2, R. 71). At the time of shipment the petitioner Friedman's Express Inc. issued its uniform straight bill of lading contained in and forming a part of the National Motor Freight Classification No. 7 on file with and approved by the Interstate Commerce Commission (Plffs' Ex. 4, R. 73). The shipper signed, received and accepted the bill of lading on respondents' behalf. The bill of lading provided that the shipment described on it was "received subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading". It also contained a notice requiring shippers to state specifically in writing

the agreed or declared value of the property where the rate is dependent on value and provided a space for such a declaration by the shipper. The terms and conditions (Sec. 2 [a]) of the Bill of Lading provided that the maximum amount to be recovered in case of loss or damage would be the value "agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based" (Plffs' Ex. 4, R. 73-74).

Petitioner Friedman's Express Inc. participated in tariffs of the Middle Atlantic States Motor Carriers Conference, Inc. to the participants of which the Interstate Commerce Commission on May 21, 1941 had issued a Released Rates Order which authorized petitioners to establish and maintain rates for the transportation of, among other commodities, rayon pajamas at a base rate with a limitation of liability to a declared or released value not exceeding \$50 per shipment of 100 pounds or less and fifty cents per pound for shipments weighing more than 100 pounds and for an additional charge of ten cents for each \$100 or fraction thereof of released valuation in excess of the limitation attached to the base rate (R. 79-81, 92).

The shipper did not declare a value in writing in excess of the released value specifically set forth in the tariff attached to the base rate. If the "released value" as stated in the filed tariffs, attached to the base rate applies, the carrier's liability is limited to fifty cents per pound on 572 pounds or \$286.

The Decision of the City Court of the City of New York, New York County:

The respondents contended in the Courts below that the limitation of liability was not stated in writing on the face of the bill of lading and that, therefore, the defense was not available to petitioners.

In sustaining petitioners' defense the trial court held that the rights and liabilities of the parties depended upon the bill of lading, tariffs and classifications on file with the Interstate Commerce Commission; that the "released value" attached to the base rate was stated in writing in the tariffs and classifications which together with the bill of lading formed the contract of carriage; that the tariffs and classifications on file with the Commission are statutory in effect and binding upon the parties; that, since the shipper did not declare a value in writing in excess of the "released value" stated in the tariffs and classifications, the liability of the petitioners was limited to the "released value" or \$286.

The Decision of the Appellate Term.

In modifying the judgment of the lower Court by increasing the amount of the judgment to the full value of the merchandise lost, the Appellate Term held that the limitation of liability was not stated in writing on the face of the bill of lading, that the provisions of the tariff and classification were insufficient to satisfy the statutory requirements and that, therefore, the carrier was liable to the full extent of the loss. In arriving at this conclusion, the Appellate Term attempted to distinguish between cases where the charges were prepaid at the time of shipment and stated in the bill of lading and cases where shipments are made with the freight charges to be collected from the consignee at the time of delivery (R. 102-109; 187 Misc. Rep. 89 [N. Y.]).

The dissenting opinion relied upon the authority of the decision of this court in *American Railway Express Co. v. Lindenburg*, 260 U. S. 584 and other decisions by the same Appellate Term (R. 109; 187 Misc. Rep. 89 [N. Y.]).

The Questions Involved.

I.—Was the provision in the Released Rates Order, Classification and Tariffs together with the Bill of Lading, a value agreed upon in writing as the "released value" of the property within the purview of Section 20, Paragraph 11 of the Interstate Commerce Act.

II.—Was the liability of the carrier limited under the Released Rates Order, the Classification and Tariffs and the Bill of Lading.

The Reasons Relied on for the Allowance of the Writ.

(a) The questions involved are of great public interest.

(b) The decision of the instant case is in conflict with the applicable decisions of this Court.

(c) There is now a conflict of judicial opinion as to the proper interpretation of Section 20, Paragraph 11 of the Interstate Commerce Act, as amended.

(d) A determination by this Court of the questions of Federal law presented is required in order to secure uniform interpretation and application of the Interstate Commerce Act, as amended.

(e) Intervention of this Court is required in order to enforce the statutory prohibition against discrimination, special rates and rebates contained in the Interstate Commerce Act, as amended.

Supporting Statements for the Reasons Relied on.

(a) The questions involved are of great public interest:

That a tremendous volume of merchandise, representing millions of dollars in value, moves by motor and rail carriers in interstate commerce daily is a matter of common knowledge. Also involved are large freight revenues and insurance premiums and risks relating to this constant flow of commerce. As a practical matter of everyday life the problems of interstate commerce directly affect every individual. Any matter that relates to the amount of the carrier's charges or to the extent of its liability for loss or damage is of direct and serious concern not only to the carriers, but equally as much, if not more so, to the public at large.

Any provision of the Interstate Commerce Act which regulates rates or responsibility must be of paramount importance to the public and carriers alike. A conclusive determination by this Court defining the rights secured and the obligations imposed by the Act and its amendments where uncertainty exists is not alone convenient to commerce, but essential to the orderly course of commercial exchange among the several states.

It is urgent that the extent of recovery provided and the limits of liability permitted by the Act as amended be settled and stated by the decision of this Court in order that shippers and receivers of freight throughout the several states may be able to adequately protect themselves in the matter of valuations on interstate shipments and with certainty avail themselves of those rates and regulations which will correspond to the responsibilities on the part of the carrier desired.

An authoritative declaration by this Court of the correct interpretation and proper application of the provisions of the Interstate Commerce Act relating to limitations of liability by common carriers of merchandise is required in order to prevent widespread discrimination, special rates and rebates which the final determination by

the State Courts in this case not only make possible, but probable.

(b) The decision of the instant case is in conflict with the applicable decisions of this Court:

In the instant case the New York Courts have refused to follow the decisions of this Court in *American Railway Express Co. v. Lindenburg*, 260 U. S. 584; *Galveston H. & S. A. Ry. Co. v. Woodbury*, 254 U. S. 357; *Western Union Telegraph Co. v. Esteve Brothers & Co.*, 256 U. S. 566; *Southern Railway Co. v. Prescott*, 240 U. S. 632; *Boston & Maine R.R. Co. v. Hooker*, 233 U. S. 97; *Kansas City So. Ry. Co. v. Carl*, 227 U. S. 639; *Pierce v. Wells Fargo & Co.*, 236 U. S. 278; *Adams Express Co. v. Croninger*, 226 U. S. 491; *Union Wire Rope Corp. v. Atchison, T. & SF Ry. Co.*, 66 F. 2nd 965, cert. denied 290 U. S. 686; *Crancer v. Lowden*, 315 U. S. 631; *Lowden v. Simonds Shields Lonsdale Grain Co.*, 306 U. S. 516; *Louisville & N. R.R. Co. v. Maxwell*, 237 U. S. 94; *Penn. R.R. Co. v. International Machine Co.*, 230 U. S. 184; *Robinson v. Baltimore & Ohio R.R. Co.*, 222 U. S. 506; *Atchison T. & SF Ry. Co. v. Robinson*, 233 U. S. 173.

(c) There is now a conflict of judicial opinion as to the proper interpretation of Section 20, Paragraph 11 of the Interstate Commerce Act, as amended:

The following cases are in accord with the decisions of this Court:

Kaufman et al. v. Penn. R.R. Co., 47 N. Y. Supp. 2d 634, aff'd App. Term, 1st Dept., April 6, 1946; *Lewis v. Acme Fast Freight, Inc.*, App. Term, 1st Dept., November 3, 1945; *Minturn v. N. Y. Central R.R. Co.*, 220 App. Div. 222; *United Lead Co. v. Lehigh Valley R.R. Co.*, 156 App. Div. 525; *D'Utassy v. Barrett, etc. Adams Express Co.*, 219 N. Y. 420; *Burke v. Union Pacific R.R. Co.*, 226 U. S. 534.

Besides the decisions in this case by the New York State Courts, the decisions in the following cases are contrary to the decisions of this Court:

Caten v. Salt City Movers & Storage Co., Inc., 149 Fed. 2d (CCA, 2nd Cir.) 428; *Mickey Finn Clothes, Inc. v. Yale Transport Corp.*, 175 Misc. Rep. (N. Y.) 242; *Amer. Ry. Exp. Co. v. S. W. Estroff*, 159 Ga. 58; *Anderson v. Atlantic Coast Line R.R. Co.*, 163 SC 350; *Kristianson v. Amer. Ry. Exp. Co.*, 122 SC 528; *Wall-A-Hee v. Northern Pacific Ry. Co.*, 41 Pac. 2d 786; *Hunter v. Amer. Ry. Exp. Co.*, 4 SW 2d 847; *Roseweb Frocks, Inc. v. Rose*, 52 N. Y. Supp. 2d 901.

(d) A determination by this Court of the questions of Federal law presented is required in order to secure uniform interpretation and application of the Interstate Commerce Act, as amended:

The purpose of the Interstate Commerce Act and its amendments is to secure uniform treatment of all phases of the relations between shippers and carriers. *Georgia, etc. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 195; *Phillips v. Girard Trucking Ry. Co.*, 236 U. S. 662.

The Courts of the various States ordinarily have followed the controlling decisions of this Court, particularly those relating to interstate commerce. However, as is evidenced by the citations above, in a great many instances, the Courts in a number of States, including New York, have issued interpretations in the application or avoidance of the application of the provisions of the Interstate Commerce Act contrary to the construction of the Act contained in the controlling decisions of this Court.

An authoritative interpretation by this Court of the law applicable to the points raised here is required to correct the error and counteract the confusion which exists and will increase unless settled specifically by this Court.

(e) Intervention of this Court is required in order to enforce the statutory prohibition against discrimination, special rates and rebates contained in the Interstate Commerce Act, as amended.

The express purposes of the Act are to make uniform throughout the United States the rights and liabilities of shippers and carriers engaged in interstate commerce and to avoid any form of preference or discrimination either in favor of or against shippers, whether by rebates, refunds or the assumption or recognition of liabilities or responsibilities which are not equally open to all shippers. The final decision in this case in the State Courts would permit shippers to forward merchandise with the freight charges to be collected from the consignee calculated on the base or lower rate where a choice of rates is afforded but, in the event of loss, to hold the carrier to a responsibility which, under the tariffs, actually would be related to a higher rate. At the same time it places carriers in the position of preferring one shipper over another without detection in a highly competitive field.

Numerous law suits and the prosecution of a large number of claims are presently held in abeyance awaiting the ultimate determination by this Court of the issues in this case.

WHEREFORE, petitioners pray that this Court issue a Writ of Certiorari to the City Court of the City of New York, County of New York, directing said Court to send to this Court for a review of the decision of the New York Court of Appeals rendered on May 15, 1947, a full transcript of the record in said Court of Appeals, in a case entitled:

MILDRED LOEB, individually and as Trustee for CAROL
LOEB and WILLIAM LOEB, and HARRY RUBENSTEIN,
co-partners doing business under the firm name
and style of STARLET UNDERWEAR Co.,
Plaintiffs-Respondents,

AGAINST

FRIEDMAN'S EXPRESS, INC. and THE GIRARD FIRE &
MARINE INSURANCE Co.,
Defendants-Appellants.

filed in the office of the Clerk of the City Court of the City
of New York, County of New York, on the 23rd day of
May, 1947, and that the decision of said Court of Appeals
be reversed; and for such other relief in the premises as
may be just.

Dated: New York, N. Y., May 29th, 1947.

FRIEDMAN'S EXPRESS, INC. and the
GIRARD FIRE & MARINE INSURANCE Co.

By: EMMET L. HOLBROOK

and

JOSEPH HASKELL

Attorneys for Petitioners.

IN THE
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No.

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MILDRED LOEB, individually, and as Trustee for CAROL
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partners doing business under the firm name and
style of STARLET UNDERWEAR Co.,
Respondents.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

Opinions Below.

The opinion of the City Court of the City of New York,
County of New York, appears at R. 82-88 (unreported).

The opinion of the Appellate Term of the Supreme
Court, First Department, appears at R. 102-109; and is
reported at 187 Misc. Rep. (N. Y.) 89.

No opinion was rendered by either the Appellate Divi-
sion (66 N. Y. Supp. 2d 634 [2]) or the Court of Appeals
(R. 113-114).

The final order and judgment of the Court of Appeals dated May 15, 1947, affirming the order and judgment of the Appellate Division is printed at pages 120 to 125 of the Record.

Jurisdiction of This Court.

The jurisdiction of this Court is based on Section 237 of the Judicial Code (28 USCA, Sec. 344) and, since the questions presented involve the interpretation and application of the Interstate Commerce Act, on Article 3, Section 2, of the Constitution.

Facts.

The facts are stated in the petition and will not be repeated here.

POINT I.

The provision in the released rates order, classification and tariffs together with the bill of lading constitute the value agreed upon in writing as the released value of the property shipped.

The action was brought under the Interstate Commerce Act, Part II, which includes by reference, provisions of Section 20, Paragraph 11 of Part I of the Act as amended by the Second Cummins Amendment, the relevant portions of which are as follows:

“That any common carrier * * * shall issue a receipt or bill of lading therefor and shall be liable * * * for the full actual loss, damage or injury to such property caused by it * * *; provided, however, that the provisions hereof respecting liability for full actual loss, damage or injury * * * shall not apply * * *; second, to property * * * concerning which

the carrier shall have been * * * expressly authorized or required * * to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property; in which case such declaration liability and recovery to an amount not exceeding the or agreement shall have no other effect than to limit value so declared or released, * * *; and any tariff schedule which may be filed * * * may establish rates varying with the value so declared or agreed upon; * * * (Interstate Commerce Act, Part II, Sec. 219; 49 Stat. L. 563; 49 USCA Sec. 319; Part 1, Sec. 20, par. [11], 34 Stat. L. 595; 38 Stat. L. 1197; 39 Stat. L. 441, 442; 49 USCA Sec. 20, par. 11; U. S. Comp. St. 8604 [a])."

The bill of lading, issued in this case, signed by shipper and carrier, expressly agreed that the shipment was "received subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading" (Plffs.' Ex. 4, R. 73), that "where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property" (Plffs.' Ex. 4, R. 73) and that "In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or *has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based*, such lower value and freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence" (Plffs.' Ex. 4, Sec. 2 [a] R. 74). (Emphasis supplied.)

Petitioner Friedman's classifications and tariffs established the base rate for the transportation by it of rayon pajamas from Sunbury, Pennsylvania, to New York City, in April 1944, at eighty-eight cents per 100 pounds (R. 55-56). The form of bill of lading issued in this case was

contained in and formed a part of petitioner Friedman's freight classification. At the time of the shipment a "Released Rates Order" was in effect and was contained in and formed part of the freight tariff to which petitioner Friedman was a party (Defts' Exs. E, F & G; R. 78-81, 90-92). The Released Rates Order provided that where the property was "released to value * * *, not exceeding fifty cents per pound actual weight for any shipment in excess of 100 pounds * * * base rate", that is, "the rates as published in tariffs", applied; and that where the property was "released to value * * * exceeding fifty cents per pound actual weight for any shipment in excess of 100 pounds" in addition to the base rate the charges applicable would be "ten cents for each \$100 or fraction thereof in excess of the valuation to which the base rate applies" (Defts' Exs. E, F and G; R. 80-81, 91).

The shipper did not declare in writing at the time of shipment any specific value of the property other or different from the released value as stated in the Released Rates Order and tariffs of petitioner Friedman (Pliffs' Ex. 4; R. 73).

There is no requirement in the Statute, the Regulations of the Interstate Commerce Commission or in the Tariffs or Freight Classification of petitioner Friedman requiring that a specific value be stated on the face of the bill of lading.

This Court has repeatedly held that where the bill of lading is contained in and forms part of the official classification and tariff schedules on file with the commission as required by the Act, it forms part of the regulations of the carrier and, therefore, forms part of the rate, *American Ry. Ex. Co. v. Lindenburg*, 260 U. S. 584; *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 638; *Boston & Maine Railroad v. Hooker*, 233 U. S. 97, 111; *Kansas City. Sou. Ry. Co. v. Carl*, 227 U. S. 639, 654; and that

the bill of lading together with the filed tariffs and classifications of which it forms a part, constitute the contract of carriage and determine the rights and liabilities of the parties. *Southern Ry. v. Prescott*, 240 U. S. 632; *Southern Express Co. v. Byers*, 240 U. S. 612; *Missouri K. & T. R. Co. v. Harriman*, 227 U. S. 657. The rates are fixed by filing with the Commission. The fixing of a rate is legislative in character (*Sou. Pacific Co. v. Bartine*, 1 F. 2d 323). The prescribed rate controls the amount to be charged for transportation. Correlatively, the prescribed rate controls the amount of the defendant's liability in the event of loss or damage. Both the shipper or owner and the carrier are bound by the lawfully established rates. *Union Wire Rope Corp. v. Atchison, T. & St. Fe Ry. Co.*, 66 F. 2d 965, cert. denied 290 U. S. 686. When duly filed, the rates become statutory in effect. *Crancer v. Lowden*, 315 U. S. 631; *Lowden v. Simonds Shields Lonsdale Grain Co.*, 306 U. S. 516; *Louisville & N. R. R. Co. v. Maxwell*, 237 U. S. 94.

It is well settled that as long as the tariffs and classifications are in force, they are to be treated as Statute, binding upon the parties to the contract of transportation. *Pennsylvania R. R. Co. v. International Machine Co.*, 230 U. S. 184; *Robinson v. Baltimore & Ohio R.R. Co.*, 222 U. S. 506; *Moore v. Duncan*, 237 Fed. 780; *Gimbel Bros. v. Barrett*, 215 Fed. 1004.

Shippers are conclusively presumed to have notice of the provisions of the filed classifications and tariff schedules. *Boston & Maine R.R. Co. v. Hooker*, 233 U. S. 97; *Atchison, T. & SF Ry. Co. v. Robinson*, 233 U. S. 173; *Kansas City So. Ry. Co. v. Carl*, 227 U. S. 639. The bill of lading in this case expressly contracts with relation to the tariffs and classifications on file with the Commission (Plffs' Ex. 4, Sec. 2 [a]; R. 74).

The shipper is bound to know the relations established between values and the rates charged and pro-

vided for in the classifications and tariffs. *Galveston H. & S. A. Ry. Co. v. Woodbury*, 254 U. S. 357; *Western Union Telegraph Co. v. Esteve Brothers & Co.*, 256 U. S. 566.

The shipper alone knew the value of the shipment. Under the tariff provisions (Defts' Ex. E; R, 91) and, therefore, under the contract of carriage, the carrier could only charge the base rate to which the "released value" stated "in writing" in the tariff attached unless the shipper specified a higher value in writing in the bill of lading which was issued, signed and accepted by the shipper in this case. The carrier may recover freight charges only on the basis of the lowest available rate. *U. S. v. Gulf Refining Co. of Okla.*, 268 U. S. 642; *Galveston v. Lykes Bros.*, 294 Fed. Rep. 968; *St. Louis v. Republic Box Co.*, 12 F. 2d 441; *American Ry. Ex. Co., Inc. v. Price Bros.*, 54 F. 2d 67; *Boone v. U. S.*, 109 F. 2d 560.

The burden of stating the value in the bill of lading rests upon the shipper. Hutchinson, in the *Law of Carriers*, Third Edition, Section 433, page 457, states:

" * * * and if the shipper should desire that a greater liability be assumed than that provided for in the contract, he must inform the carrier, whether the inquiry be made of him or not, of the value of which he wishes him to assume the risk and must compensate him accordingly."

The leading case in point is that of *American Railway Express Co. v. Lindenburg*, 260 U. S. 584. There the shipper gave the Express Company two trunks and a package for transportation. The receipt issued by the carrier by its printed terms, just as the bill of lading in this case, expressly incorporated into the contract of carriage the classification and tariffs duly filed with the

Commission, and limited liability in the absence of a higher value declared by the shipper, to the released value attached to the base rate applicable as contained in the filed tariffs. The shipper did not declare a value higher than the released value, but accepted the receipt and acted upon it without signing it. The shipper contends that he had not agreed to the released value provided in the printed terms and tariffs because he had not signed the receipt and because the form of receipt used was not exactly the same as the form contained in the classifications and tariffs of the carrier. The *Lindenburg* case was decided subsequent to the Second Cummins Amendment and this Court held the form of bill of lading contained in the classifications and tariffs of the carrier controlled rather than the form that was actually issued; that signing of the receipt was not essential; that knowledge by the shipper of its contents was presumed; that the receipt showed that the charge made was based upon a released valuation unless a greater value was stated therein; that the knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission (citing *Adams Express Co. v. Croninger*, 226 U. S. 491, 508-509, 510, a case decided prior to the Second Cummins Amendment); that the shipper was estopped from asserting a value higher than the released value; and sustained the limitation of liability to the released value as stated in the classifications and tariffs of the carrier.

In the instant case the bill of lading expressly provides, in the absence of a higher value specifically declared by the shipper in writing, that the carrier's liability is limited to the released value "as determined by the classification or tariffs upon which the rate is based" (Pliffs' Ex. 4, Sec. 2 [a]; R. 74).

Since the complete contract of carriage consists of the released rates order, the carrier's classification and tariffs together with the bill of lading and no higher value was specifically declared by the shipper the "released value" as specifically stated in writing in the released rates order classifications and tariffs, and specifically mentioned in writing in the bill of lading, constitute the value agreed upon in writing as the "released value" of the property involved.

POINT II.

The liability of the carrier Friedman was limited to the "released value" under the provisions of the Released Rates Order, Classification and Tariffs and the Bill of Lading.

Transportation commenced at the moment the property was released to the carrier for that purpose. *Penna. RR Co. v. Public Utilities Com. of Ohio*, 298 U. S. 170, 175. The obligations of the parties were fixed at the time the shipment was delivered into the carrier's possession.

The rate and amount of freight which the carrier could charge the shipper or, as in this case, which the carrier could charge the consignee at destination were determined at the time transportation commenced. Since the carrier had lawfully established a schedule of rates dependent on the value declared or released, and the extent of the carrier's liability, correlatively, the extent of petitioners' liability in this case was determined at the moment transportation commenced.

The terms and conditions of the contract of carriage are complete and definite at that time. This is so even though no bill of lading actually be issued. *American Ry. Ex. Co. v. Lindenburg*, 260 U. S. 584; *New York Central R.R. Co. v. Lazarus*, 278 F. 900. The bill of lading is con-

tained in and forms part of the official classification and tariff schedules on file with the Commission as required by the act and, as such, forms part of the regulations of the carrier. It, therefore, forms part of the rate.

American Ry. Ex. Co. v. Lindenburg, 260 U. S. 584;

Southern Ry. Co. v. Prescott, 240 U. S. 632, 638;
Boston & Maine Railroad v. Hooker, 233 U. S. 97, 111;

Kansas City Sou. Ry. Co. v. Carl, 227 U. S. 639, 654;

Union Pacific RR Co. v. Burke, 255 U. S. 317.

The right of the carrier to protect himself from fraud and imposition by reasonable rules and regulations is correlative to his elementary right to receive a compensation commensurate to the risk assumed. He may limit the amount of recovery in case of his liability by offering a choice of rates "tied" to the varying limitations.

Pierce v. Well Fargo & Co., 236 U. S. 278;

Kansas City Sou. Ry. Co. v. Carl, 227 U. S. 639, 654;

Adams Express Co. v. Croninger, 226 U. S. 491;

Hart v. Pennsylvania R.R. Co., 112 U. S. 331;

Bank of Kentucky v. Adams Express Co., 93 U. S. 174.

Accordingly, defendant Friedman's tariffs and classification provided a choice of rates "tied" to limited and unlimited liability (Defts' Ex. F, Rule 34, p. 38). As pointed out above, the rates fixed by filing with the Commission; the fixing of a rate is legislative in character; the prescribed rate controls the amount to be charged for transportation; correlatively, the prescribed rate controls

the amount of the defendant's liability in the event of loss or damage; both the shipper or owner and the carrier are bound by the lawfully established rates; when duly filed, the rates become statutory in effect. We have also pointed out above that the tariff and supplements thereto, the released rates order and the classifications under which the defendant operated, are as much a part of the contract as though set forth in full on the face of the bill of lading and binding upon all of the parties alike; that it is well settled that as long as the tariffs and classifications are in force, they are to be treated as Statute, binding upon the parties to the contract of transportation; shippers are conclusively presumed to have notice of the provisions of the filed classifications and tariff schedules; the bill of lading in this case expressly contracts with relation to the tariffs and classifications on file with the Commission (Plffs' Ex. 4, Sec. 2 [2], R. 74).

At the time the shipper "released" the shipment to Friedman, he did not declare a value in excess of 50 cents a pound. He was conclusively presumed to have knowledge of Friedman's tariffs fixing a base rate applicable where the shipment was "released" for transportation without a higher or different value declared in writing (Defts' Ex. No. F, p. 38, Rule 34). The base rate is the lower rate applicable between a "released value" of 50 cents per 100 pounds and a higher "declared" value in excess thereof.

We have shown under Point I, that the shipper is bound to know the relations established between values and the rates charged and provided for in the classifications and tariffs; the shipper alone knew the value of the shipment; that under the tariff provisions (Defts' Ex. No. E, R. 91) and, therefore, under the contract of carriage, the carrier could only charge the base rate to which the "released value" stated "in writing" in the

tariff attached unless the shipper specified a higher value in writing in the bill of lading which was issued, signed and accepted by the shipper in this case; and that the carrier may recover freight charges only on the basis of the lowest available rate.

The shipper or owner may recover only the value "tied" to the freight charges which the carrier may lawfully charge and collect either at the time of shipment or at the time of delivery. As stated by this Court in *Galveston H. & S. A. Ry. Co. v. Woodbury*, 254 U. S. 357, "Since the transportation here in question was subject to the Act to Regulate Commerce, both the carrier and passenger (shipper in this case) were bound by the provisions of the published tariffs".

The decisions of the New York Appellate Courts in this case in effect hold that an interstate carrier may transport property with the amount of its freight charges limited to a base rate but may waive the limit of liability established by the tariffs attaching thereto by not endorsing specifically the "Released Value" on the face of the bill of lading. This Court in *Georgia, Florida & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 197, said; "But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed (citing). We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and as we find it to be both applicable and valid, effect must be given to it."

Therefore the liability of the carrier Friedman was limited in this case to the "Released Value" of the property shipped under the provisions of the "Released Rates Order", the filed classification and tariffs and the bill of lading.

CONCLUSION.

Wherefore it is respectfully submitted that a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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